

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Acceleration of Broadband Deployment by	)	WT Docket No. 13-238
Improving Wireless Facilities Siting Policies	)	
	)	
Acceleration of Broadband Deployment:	)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of	)	
Broadband Deployment by Improving Policies	)	
Regarding Public Rights of Way and Wireless	)	
Facilities Siting	)	
	)	
Amendment of Parts 1 and 17 of the	)	RM-11688 (terminated)
Commission's Rules Regarding Public	)	
Notice Procedures for Processing Antenna	)	
Structure Registration Applications for	)	
Certain Temporary Towers	)	
	)	
2012 Biennial Review of	)	WT Docket No. 13-32
Telecommunications Regulations	)	

**COMMENTS OF HAPPY VALLEY, OREGON**

The City of Happy Valley, Oregon appreciates the opportunity to respond to the Federal Communication Commission's ("Commission") Notice of Proposed Rulemaking ("Draft Rules"), released on September 26, 2013, in the above-entitled proceeding.

**INTRODUCTION**

Happy Valley, Oregon is one of the fastest growing cities in the State of Oregon, with a population of approximately 16,000. Happy Valley is located six miles east of Portland, Oregon, and west of the scenic Mt. Hood recreation area. Residents of Happy Valley enjoy abundant

neighborhoods, a good quality of life, beautiful parks and nature areas, shopping and amenities, and outstanding City services. The City is home to Oregon's largest healthcare industry and related businesses sector. The City takes pride in its efforts to create a well-planned and balanced community with opportunities for significant economic development.

The City has significant concerns about two aspects of the Draft Rules in particular: the Commission's proposed interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 ("Section 6409(a)") and the consideration of changes to the Commission's interpretations of Section 332(c)(7) in the *2009 Declaratory Ruling* ("Shot Clock Rule"). While the City supports efforts to encourage the deployment of broadband services, the Draft Rules would unnecessarily restrict local oversight and zoning authority, interfering with the City's efforts—and duty—to maintain a very livable community that offers advanced communications services and continued economic development.

#### **IMPLEMENTATION OF SECTION 6409(a)**

Under Section 6409(a), city permitting authorities "may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." Congress did not define the terms "wireless tower," "base station," or "substantially change the physical dimensions." In the Draft Rules, the Commission seeks comment on: (1) whether or not to adopt rules defining those terms, and (2) proposed definitions for those terms. The City's experience does not support the need to define those terms at this time, and certainly not in the overly restrictive, one-size-fits-all manner proposed in the Draft Rules.

The City has implemented a common sense process for review of collocation applications that varies based on the zoning of the property where the facilities are to be installed. The

collocation of antennas on existing towers in institutional/public use, industrial and commercial zones are permitted uses subject only to approval by the City's building official. The same is true of collocations on alternative structures, such as buildings and utility poles, which do not exceed certain height limits. Collocations on towers or alternative structures in residential zones are conditional uses, subject to a public hearing process. The City's review process has effectively managed the three collocation applications it has received in the last few years, each of which required only a simple building permit. No applicant has complained about the City's collocation approval process or, to the City's knowledge, abandoned a collocation plan due to this process.

In short, the City has a process that works. Yet several of the proposed definitions in the Draft Rules would undermine the City's very reasonable land use requirements and prevent the City from fulfilling its obligation to protect the health, safety and welfare of its citizens. For example, the proposed test to define the phrase "substantially change the physical dimensions" results in rigid percentages or numerical rules that do not take into account the characteristics of the existing structure and neighborhood or the applicable land use requirements and decisions. A collocation that increases an existing facility by up to twenty feet or ten percent could have a very significant, negative impact in a residential neighborhood that may not be true of a similar collocation in an industrial zone. The City's zoning laws account for that, whereas the Draft Rules do not. Happy Valley residents have expressed concern with ensuring appropriate screening or use of stealth towers in residential areas, which is reflected in the City's existing zoning laws. The Draft Rules could remove the City's ability to address this important issue, substituting the Commission's judgment for the City's when it comes to very local land use matters.

Further, this proposed test does not take into consideration any conditions placed on the approval of the original tower or base station. The City's zoning authority would be gutted entirely if the Draft Rules disregard the important safety and aesthetic conditions the City imposed on the original structure as necessary to preserve the safety and quality of its neighborhoods. This concern is exacerbated to the extent the new rules apply the "substantially change" test based on the structure as altered by subsequent collocations rather than based on the original structure. Hamstringing cities in this way seems likely to lead to significant issues with the approval process of new "tower or base stations" as residents and local officials realize that the tower or base station described in the original application could grow exponentially over time without local authority to ensure it remains safe and compliant with local zoning and land use regulations.

The City is also concerned about the prospect of interpreting the phrase "must approve" in Section 6409(a) to preempt any conditions on the approval of a collocation. Currently, the City requires appropriate screening or stealth structures and may impose conditions primarily related to landscaping and addressing issues of glare and the safety of the structure. These very reasonable conditions have not deterred any collocation applicant from proceeding with installation, and the City needs to retain its authority to impose such conditions.

Finally, the City strongly opposes defining "existing" towers and base stations to include any existing structures even if they do not currently hold wireless communications equipment. The City's careful land use planning and regulations would be eviscerated if it were forced to approve any eligible application to place facilities on any structure anywhere in the City.

The City supports and encourages deployment of wireless facilities needed to meet the demand for wireless services and has worked hard to balance this goal with its obligation to

protect the health, safety and welfare of its residents. The City has achieved this balance by enacting local zoning regulations that have worked well in enabling prompt but thoughtful collocations. The Draft Rules would override these carefully crafted regulations, imposing instead a one-size-fits-all set of regulations that cannot address the unique aspects of the City or any other community even where, as in Happy Valley, there have been no issues with collocation. If the Commission does not wish to be the “national zoning board,”<sup>1</sup> the Commission should refrain from adopting rules that remove local authority to the extent contemplated in the Draft Rules, and should provide states and local governments the opportunity to work with local stakeholders, including wireless providers, to craft solutions to any issues that may arise related to collocation.

#### **IMPLEMENTATION OF SECTION 332(c)(7)**

Under the Shot Clock Rule, a wireless provider may seek a judicial remedy when a city does not approve or deny a permit application for a collocated site within ninety days or a new site within one hundred fifty days. In the Draft Rules, the Commission seeks comment on whether it should clarify certain aspects of its Shot Clock Rule, including the appropriate remedy in the event of a violation of the Shot Clock Rule.

The City objects to any effort to ignore the plain language of Section 332(c)(7)(B)(v), and the remedy—review by a local court—that the Commission already determined is mandated by the statute.<sup>2</sup> The determination that a governmental entity has failed to comply with the Shot Clock Rule (or to grant an application governed by Section 6409(a)) will require careful, fact specific analysis of the application and the actions or inaction of the applicant and the governmental entity. This analysis should be left to local courts, not the imposition of a “deemed

---

<sup>1</sup> Draft Rules par. 99.

<sup>2</sup> See 2009 Declaratory Ruling, 24 FCC Rcd at 14009 par. 39.

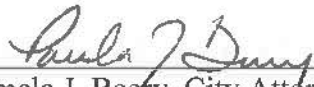
granted” remedy by the Commission that requires a local government to issue a permit or land use approval without prior review of the facts.

### **CONCLUSION**

The City of Happy Valley, Oregon appreciates the Commission’s efforts to better understand the local practices and policies for collocation wireless facilities. The City requests that the Commission consider these comments, as well as those submitted by all cities, before taking any action that may adversely affect the land use and zoning authority of cities.

Respectfully submitted,  
City of Happy Valley, OR

By:

  
\_\_\_\_\_  
Pamela J. Beery, City Attorney  
Beery Elsner & Hammond LLP  
1750 SW Harbor Way, Suite 380  
Portland, OR 97201-5106  
(503)226-7191